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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

Nos. 74-1107
74-1304

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT,
B. L. BARNETT, individuals, and
SPRING MEADOWS RANCH,
Defendants and Appellants,
and
STATE OF NEVADA, ex rel. ROLAND D. WESTERGARD,
State Engineer,
Intervenor and Appellant.

BRIEF FOR INTERVENOR-APPELLANT STATE OF NEVADA

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In the Supreme Court
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United States

October Term 1975

Nos. 74-1107
74-1304

United States of America,
Plaintiff and Appellee,

vs.

Francis Leo Cappaert, Marilyn I. Cappaert,
B. L. Barnett, individuals, and
Spring Meadows Ranch,
Defendants and Appellants,

and

State of Nevada, ex rel. Roland D. Westergard,
State Engineer,
Intervenor and Appellant.

BRIEF FOR INTERVENOR-APPELLANT STATE OF NEVADA

The State of Nevada, Intervenor-Appellant, in the District Court of the State of Nevada and the Ninth Circuit Court, respectfully requests that the order of the United States Court of Appeals for the Ninth Circuit, entered

in the above-entitled case on December 4, 1974, affirming the decision of the District Court granting a permanent injunction in favor of Respondent-United States of America and against Appellant-Francis Leo Cappaert, et al., be reversed and said injunction dismissed.

OPINIONS BELOW

The findings of fact, conclusions of law, and final decree of the United States District Court for the State of Nevada are reported in 375 Fed.Supp. 456 (1974). The opinion of the Ninth Circuit Court entered December 4, 1974, is reported in 508 F.2d 313. The text of the Ninth Circuit Court opinion is set out in Appendix "A" to the State of Nevada's Petition for a Writ of Certiorari filed herein.

JURISDICTION

The final judgment of the District Court of Nevada was entered on April 9, 1974, (375 F.Supp. 456 (1974).) The judgment of the Court of Appeals affirming the District Court's judgment was entered on December 4, 1974, (508 F.2d 313 and Intervenor-Appellant's application for writ of certiorari). A timely petition for rehearing was denied on January 31, 1975. (Intervenor-Appellant's application for writ of certiorari). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

State and federal statutes involved in this case are set forth in Appendix "A".

QUESTIONS PRESENTED

I. Does the Doctrine of Implied Reservation Apply to Create in the United States Government a Right to Appropriate Unappropriated Water Beneath Reserved and Non-Reserved Lands?

II. Does the State of Nevada Have Jurisdiction to Determine Both the Existence and Scope of All Water Rights, Including Reserved Rights, That Might be Asserted to the Water in Devil's Hole?

III. The United States Government is Precluded by the Principles of Res Judicata from Collaterally Attacking the Administrative Decision on Defendants Cappaerts' Applications for Appropriation.

STATEMENT OF THE CASE

Appellants Cappaerts have set forth in their brief an extensive and detailed statement of the facts with particular emphasis on facts concerning the nature of the ranch, Devil's Hole, the pupfish, and the background of the Presidential Proclamation reserving Devil's Hole Monument, all of which petitioner State of Nevada agrees with, and it would serve no purpose to reiterate in total those facts. However, certain limited facts are worth repeating especially with regards to the action of the United States Government prior to the filing of its Complaint.

In April of 1970, prior to this action and pursuant to state law, appellants Cappaerts and their predecessor Spring Meadows, Inc., filed application with the State of Nevada for appropriation of groundwater by means

of wells located on appellants Cappaerts private land adjacent to Devil's Hole Monument (R 000355, Appendix, pp. 281, 282 of Designated Record).

Subsequently the United States Government through the National Park Service protested in writing said application. (R 000257-280, Appendix Exhibit 12-17, pp. 269-280 of Designated Record). A hearing in which the United States Government participated fully through counsel from the Solicitor-General's office, who presented evidence in the form of both witnesses, (R 000403-000417), and documents, (R 000370, lines 19-25, Appendix pp. 294-295, R 000371, Appendix 215 of Designated Record), was held on December 16, 1970. Following the hearing the State Engineer rendered his decision to issue the permits to appellants Cappaerts to appropriate the groundwater, specifically rejecting the existence of a federal water right (R 000434-437, Appendix pp. 310-311 of Designated Record).

Approximately six (6) months later the United States Government filed in Federal District Court its Complaint and Motion for Preliminary Injunction. The decision of the State Engineer was not appealed by the United States Government as provided for by Nevada law.

Following entry of a preliminary and final injunction by the District Court recognizing an implied water right in the United States Government and restricting the pumping of water adjacent to Devil's Hole, notices of appeal were filed with the Ninth Circuit Court of Appeals by appellants Cappaerts and Intervenor State of Nevada.

Following the submission of briefs and oral argument, the final judgment of the Ninth Circuit Court of Appeals

was entered on December 4, 1974, affirming the District Court's judgment on the ground that the reservation of Devil's Hole by the Presidential Proclamation issued pursuant to the authority of the 1906 Act for the Protection of American Antiquities (Act of June 8, 1906. See 306, 34 Stat. 225, now 16 U.S.C. § 431-433) created an implied water right in the United States Government to all unappropriated water beneath reserved *and* non-reserved private land necessary to insure the survival of the pupfish; and further, holding that the United States Government is in no way bound by the state water laws in establishing such an implied water right.

SUMMARY OF ARGUMENT

I. THE CIRCUMSTANCES SURROUNDING THE RESERVATION OF DEVIL'S HOLE DOES NOT JUSTIFY IMPLYING AN INTENT TO RESERVE WATER RIGHTS THAT AFFECT WATER ON ADJACENT NON-RESERVED LAND.

It is the contention of the State of Nevada that a thorough analysis of the facts of the cases that have invoked the implied reservation doctrine establishes that the doctrine is based upon the concept of necessity which in turn invokes a process of a competing interest, not just the interest of the United States Government. As a result, if the purpose of the reservation requires some water and if effecting such purpose is of more importance to the general welfare than use of the water by competing interests, the doctrine may be applied. Absent such compelling circumstances, it should not be applied.

Because the application of the reservation doctrine creates new water rights with wide ranging ramifications,

the act of reservation itself, i.e., the congressional legislation authorizing such reservation, should be strictly construed as should the other circumstances surrounding the reservation, such as the nature of the water, i.e. underground water.

The circumstances surrounding the reservation of Devil's Hole Monument does not support an implied intent to use reserved water rights.

Congress did not give President Truman authority under the terms of the Antiquities Act, which was the basis for the reservation, to also reserve water rights. Additionally, the implied reservation theory should not be applied to ground water because of the highly unusual and unpredictable nature of its hydrology. Also, the nature of the competing water interests—the use of the water by the farmer versus the highly speculative allegation that such use will, some time in the future, affect the evolution of fish—dictates strongly against an implied right.

II. THE UNITED STATES GOVERNMENT SHOULD BE REQUIRED TO EFFECT THEIR WATER RIGHTS IN ACCORDANCE WITH STATE LAW.

The United States Government, when it desires to assert a water right of whatever kind, should be required to comply with the state procedures for asserting such right. If it feels aggrieved by the decision of the state body, it should then appeal to the Federal District Court, which would have jurisdiction because it involves a federal question. Congress, beginning with legislation passed in 1866, has on several occasions expressed its clear in-

tent that the states shall have control of all of the water in the state on public land. Several judicial decisions, which are cited hereinafter, have confirmed this interpretation. Interpreting the McCarran Act (Appendix A, page I), to have waived the sovereign immunity of the United States Government in water right cases is simply a further extension of congressional policy that the states should determine the existence and scope of all water rights, including those claimed by the United States Government.

By interpreting it broadly and together with the various other earlier congressional enactments, this legislation is authority for requiring the United States Government to comply with state procedures for asserting their water rights.

This result is confirmed in principle in the case of *U. S. v. District Court for the County of Eagle*, 401 U. S. 520, 28 L.Ed. 2d 278, 91 S.Ct. 998 (1971), which held that the states have authority to adjudicate appropriative, riparian, and reserved rights.

III. THE UNITED STATES GOVERNMENT IS BARRED BY THE PRINCIPLE OF RES JUDICATA FROM ASSERTING WATER RIGHTS IN THIS ACTION.

The United States Government participated fully in the state administrative hearing on whether to grant to Appellants Cappaerts water through various wells on their land by filing written protests presenting documentary evidence and presenting testimony through a hydrology expert. Counsel for the United States was allowed to fully argue the basis of the government's protests to Cappaerts' applications.

Full participation in an administrative hearing that decides the issues involved in subsequent litigation should bar the subsequent litigation.

The theory of res judicata applies even if certain issues were not raised if, in fact, they could have been raised at such hearing. The United States Government could have more fully raised the issue of an implied right by specifically arguing such or presenting additional evidence to support a claim to an implied water right. However, the fact that they failed to more diligently pursue their claim does not prevent the doctrine of res judicata from applying.

ARGUMENT

I. DOES THE DOCTRINE OF IMPLIED RESERVATION APPLY TO CREATE IN THE UNITED STATES GOVERNMENT A RIGHT TO APPROPRIATE UNAPPROPRIATED WATER BENEATH RESERVED AND NON-RESERVED LANDS?

The instant case presents a clear conflict between federal water need and private rights, and the collateral question of whom shall determine the extent and scope of those rights. The first question that must be answered is whether an implied right can be found to exist from the circumstances of this case.

Initially, it is the contention of the State of Nevada that Congress did not give President Truman authority under the terms of the Act for Protection of American Antiquities, 16 U.S.C.A. 431-433, which was the statutory basis for the executive proclamation reserving Devil's Hole Monument to also reserve water rights. However, even assuming that such authority is implied or unnecessary, it is the further contention of the State of Nevada that the implied reservation doctrine should be narrowly construed, and unless the act of reservation clearly expresses the intent to claim a federal water right, the doctrine should be applied only in limited circumstances.

In order to make a valid determination as to whether the United States Government can have a right to the use of the water in Devil's Hole and from beneath the surrounding private land by virtue of the implied reservation doctrine both historical development of the water law in the State of Nevada and the circumstances surrounding the reservation of Devil's Hole must be examined.

A. Appropriative water rights.

Basic to an understanding of the issues involved in the instant case, particularly with regards to the State of Nevada's position, is some further understanding of the historical development of various water right doctrines or theories that have developed and been in existence for some time in the State of Nevada.

In 1848 as a result of the treaty of Guadalupe Hidalgo, the United States Government became the owner of public domain land formerly owned by Mexico and which included most of the area now designated as the State of Nevada. In and after 1848, principally through the activities of the miners of the Nevada area, the custom and concept of prior appropriation arose. The concept of prior appropriation is that a prior appropriator of water was protected against later appropriations, with the central principle of this doctrine being that beneficial

use of water, not land ownership, is the basis of the right to use the water. *Atchison v. Peterson,* 87 U.S. 507 (1874); Powell, Real Property, Vol. 5, page 734, page 442.

During the period between 1848 and 1866, various state supreme courts, including Nevada's, adopted and used the customary law of prior appropriation as a basis for resolving early water disputes, thus making prior appropriation the common law of the western states, *Irving v. Phillip,* 5 Cal. 140 (1955); *Lobdell v. Simpson,* 2 Nev. 274 (1866). Recognition by the United States Government of the custom of prior appropriation before 1866 was implied by virtue of the fact that they allowed such use to take place upon public domain without dissent. *Basey v. Gallagher,* 87 U.S. 670, 22 L.Ed. 452 (1874).

Between 1866 and 1877 Congress enacted several public land laws which were judicially interpreted to mean that the existence, use and control of water rights on the public domain land should be determined in accordance with local custom, law and court decision.

The first of these Congressional enactments was the Act of July 26, 1866, Ch. 262, § 9; 14 Stat. 253 (now Act of July 10, 1952, Ch. 651, § 208(A-2), 66 Stat. 560, 43 U.S.C. § 661 (1938)), which specifically recognized the existence and validity of water rights acquired prior to the statute pursuant to local custom, law or court decision.

The United States Supreme Court confirmed this interpretation of the 1866 statute by holding that said statute was a Congressional recognition of the validity of water rights established pursuant to local custom. *Atchison v. Peterson,* supra; *Basey v. Gallagher,* supra, and *Jennison v. Kirk,* 98 U.S. 453, 460 (1878).

A later, even more significant act in this regard was the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 (1958), which was judicially interpreted in 1936 to have severed, for purposes of private acquisition, soil and water rights on public lands, and further provided that such water rights were to be acquired in the manner provided by the law of the state of location, thereby judicially confirming that the water was under *public ownership. California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U. S. 142 (1935); *Federal Power Commission v. Oregon,* 349 U. S. 435, 448 (1955). The Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* supra, said in interpreting the meaning of the Desert Land Act and the 1866 Act, "[T]he effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use as recognized by local rules and customs and the legislation and judicial decision of the arid land states, as the test and measure of private rights in and to the unappropriated water on the public domain."

In *Ickes v. Fox,* 300 U.S. 82, the Court held that by the Desert Land Act, "if not before, Congress had severed the land and water constituting the public domain and established the rule that for the future the lands should be patently separated . . .; *but all non-navigable waters were reserved for the use of the public land under the laws of the various arid land states".* Id. at 95. (Emphasis added). The Ninth Circuit Court in 1939 stated that the Act of 1866 was a formal confirmation of local laws and usage which had prior to said date met with acquiescence on the part of the federal government. *U.S.*

v. Walker River Irrigation District, 104 F.2d 334 (CCA 9th 1939).

The Desert Land Act has also been interpreted as severing underground water, as well as surface water, from the land and, therefore, applying to all water on or under public land. *State v. Dority,* 225 P.2d 1007 (N. Mex. 1950); *California Oregon Power Co. v. Beaver Portland Cement Co.,* supra.

The 1866 and 1877 federal acts as subsequently interpreted by the courts are clear Congressional expressions that all water located on public land within a particular state is a subject of primarily local significance, and the rights to use such water should be determined, controlled and administered by the states. The above cases taken together constitute an unequivocal holding that the Desert Land Act and related statutes have transferred sovereign authority over water within these boundaries to the states thereby specifically rejecting the theory that the United States *owns* such water.

By 1913 Nevada, in line with the clear intent of the several cited Congressional enactments and judicial determinations, had adopted a comprehensive water code which established a systematic and orderly procedure for procuring an appropriated water right. (Statutes of 1913, Ch. 140, in Chapter 440 now Chapter 533.010 of the Nevada Revised Statutes, etc.) Pertinent provisions appear in Appendix "A." A similar statutory scheme (Statutes of 1936, Chapter 178 now Chapter 534 of the Nevada Revised Statutes) was adopted in 1939 for underground water, and its pertinent provisions appear in Appendix "A."

The water right statutes of Nevada accord the same privileges to the United States Government as to any other public or private entity in making an appropriation of water. Ownership of real property is not necessary to support the right to use water. The various federal land acts, cited above, declared all water situate on or under public domain land to be *publici juris,* and the Nevada court and legislature merely carried out that Congressional intent in its water code.

The constitutionality of the basic principles of the Nevada water code were upheld in the cases of *Vineyard Land and Stock Co. v. District Court,* 42 Nev. 1, 171, page 166 (1918) and *Humboldt Lovelock Irr. Light and Power Co. v. Smith,* 25 F. Supp. 571, 575 (D. Nev. 1938).

The concept of federal government water rights being determined pursuant to state law is not new. The necessity of compliance of the federal government with the laws of the State of Nevada in the acquisition of water rights has been noted in several cases. *Bergman v. Kearney,* 241 F. 884, at 892 (D. Nev. 1917); *U.S. v. Humboldt Lovelock Light and Power Co.,* 97 F.2d 38, pp. 42-45 (CCA 9th 1939).

Both the state and federal judicial and legislative histories of water development in the State of Nevada establish beyond doubt that the Nevada state statutory scheme is necessarily applicable to determining the existence and scope of any "right to the use of water in the State of Nevada." Additionally, as will be demonstrated in Section II, infra, the State of Nevada's statutory water scheme also provides a perfectly satisfactory

method of adjudicating the existence and scope of implied rights that may be asserted.

B. Implied reservation theory.

During the latter stages of the long history of the recognition and development of the appropriation doctrine as the accepted and legitimate means of determining water rights in waters on or under public domain in the State of Nevada, the seeds of the so-called "reservation doctrine" were sown.

The bitter-sweet fruits of that doctrine found their first judicial application in *Winters v. U.S.*, 207 U.S. 564 (1908), wherein it was invoked to provide water rights to surface water for Indians who had been relocated pursuant to a written treaty with the United States Government on a small, arid tract of land called a reservation for purposes of earning a living by farming. Although the area of the reservation was described in the terms of the treaty and specifically reserved from public land for use by the Indians, the treaty itself failed to expressly mention anything about water rights. The court after a thorough discussion of the circumstances pointed out that the Indian reservation land would be useless without irrigation water and held that in the absence of an express provision so providing the only inference that could be drawn from these circumstances was that when the United States Government restricted the Indians to a particular tract of land for purposes of farming, it also intended to provide at the same time the right to appurtenant surface water from the non-navigable Milk River so that the land could sustain life.

Even in light of these very compelling circumstances, the court recognized the highly sensitive area of competing water interests when in interpreting the meaning and effect of the treaty said:

> "We realize there is a conflict of implication, but that which makes for the retention of the water is of greater force than that which makes for their cession."

The court in the *Winters* case was undoubtedly weighing the conflicting equities in their determination as to whether to "imply" a congressional intent to reserve water rights for the benefit of the Indians. Certainly the reasoning of the *Winters* case does not sustain a contention that mere reservation of land for Indian, or more particularly for non-Indian uses, *automatically* reflects an intention to reserve the water as well.

The doctrine that grew out of the *Winters* case was a doctrine of need, an equitable doctrine. It was a recognition of the right to reasonable use of water based upon need, not the fact the Indians or government owned the land.

The next occasion the United States Supreme Court had to talk about the reservation doctrine was in the case of *Federal Power Commission v. Oregon, supra,* hereinafter referred to as the *Pelton Dam* case. This case specifically involved the Federal Power Act, 49 Stat. 863 (1935); 16 U.S.C. Sections 791-888(c) (1958), the purpose of which is not applicable to the present case. The *Pelton Dam* case was essentially a matter of construction of the effect of the Federal Power Act. It is a so-called "supremacy" case, and the discussion of the implied reservation doc-

trine was essentially dictum, and not necessary to the disposition of the case. All that was required to reach the decision the court did was to hold that the Federal Power Act should prevail by virtue of the Supremacy Clause of the United States Constitution.

The Federal Power Act was an express pronouncement by Congress stating that certain lands and the water on the land should be used for purposes of establishing electrical power sources for urgently needed electricity. The Act contains certain provisions regulating the use of water needed for the power project. Therefore, the need to imply the intent to reserve water was not present in that case. The intent was expressed in its very terms.

Although the court in the *Pelton Dam* case discussed the theory of ownership of land as creating a water right in the United States, all that was necessary to sustain the issuance of the license without state approval was the recognition that the Federal Power Act, as an expressed purpose of Congress to utilize certain water in furtherance of its constitutional power for the protection of the general welfare (U.S. Constitution, Article I, §8) superseded the inconsistent provisions of Oregon State law.

It is interesting to note in light of the government's strong advocacy for protection of the fish in the instant case that the real justification and effect of the *Pelton Dam* decision was that the purpose of the Federal Power Act to provide much needed electrical power for the general welfare of the people must take priority over the state's concern for the conservation of fish.

The next judicial mention of this court of the implied reservation doctrine was in the case of *Arizona v. California*, 373 U.S. 546 (1963). In this case the United States asserted claims on behalf of various Indian reservations and other non-Indian national lands to water both from the tributaries located in various states and the main stream of the Colorado River. Page 595. Because of the provisions of the Boulder Canyon Project Act, 45 Stat. 1057 (1928) excluding tributaries from federal control, the special master appointed by the court specifically refused to consider any government claims to tributaries and only addressed himself to the adjudication of the main stream claims. Page 595. Before the court began any discussion of the implied reservation theory, they also specifically stated that they would consider only the claims of the government on behalf of the Indian reservations to water in the main stream, not tributaries. Page 595. Due to the fact that the various states located along the main stream of the Colorado River, after several years of negotiating, could not agree on a scheme to control the use of the water of the Colorado River, Congress, through the provisions of the Boulder Canyon Project Act, stepped in and withdrew the state's authority and control over the main stream in order to provide a comprehensive water use plan beneficial to all of the states. The Indian reservations for which the United States Government was claiming water rights were adjacent to the main stream. In reality, the effect of the master allocating implied water rights to these reservations only from the main stream, was merely a carrying out of the expressed congressional intent that the main stream water be allocated to all users bordering the river.

In effect the master was acting only on "specifically reserved water covered by the project act in the main stream

of the Colorado River." Again, the same result could have been reached through the supremacy of the federal legislation over the various state interests. However, the court did go on to discuss the implied reservation doctrine. The application of the implied reservation doctrine in the *Arizona v. California, supra,* case came only in response to an argument by the State of Arizona to the effect that no water rights were reserved by congressional enactment because there was no evidence showing Congress intended to reserve such water. Page 598.

In response the court, utilizing the principles of the *Winters* case, held that the circumstances of the Indians, i.e., being forced to live in a dry, arid area of the State were special and compelling circumstances that justify the finding of an implied congressional intent to also reserve water for their use. Pages 599, 600.

The real basis of the portion of the decision relating to Indian reservation land was the unusual circumstances surrounding the plight of the Indian as a result of U. S. Government action. The special circumstances of the Indian could justify only one inference—the United States Government intended to provide them with water as well as land, and the court's result was perfectly in line with the *Winters* decision.

However, the court, regrettably without any illuminating discussion, went further and stated that they agreed with the special master that the principle underlying the reservation of water rights for Indian reservations was equally applicable to non-Indian reservations. Page 601. Thus, without any discussion whatsoever of the circumstances surrounding the existence of recreational areas,

the court concluded that the principle established in the *Winters* case automatically applied to non-Indian lands. Yet, just as in the *Winters* case, the court in the *Arizona v. California, supra,* case in considering the Indian reservation land went very carefully into the special circumstances from which they implied congressional intent to reserve water for Indian lands.

Therefore, it is difficult to understand how the implied reservation theory whose application was carefully supported by examination of circumstances surrounding the act of reservation can suddenly be used to support a reservation of water rights without any examination of circumstances at all.

Thus, just as in the case of Indian lands the intention of the United States Government to reserve water for use on non-Indian land should only be implied after an examination of the circumstances surrounding the act of reservation.

Finally, in 1971 the court in the case of *U. S. v. District Court for the County of Eagle,* 401 U.S. 520, 28 L.Ed.2d 278, S.Ct. 998 (1971), suggested, by dictum, with very little discussion, as the Colorado Court was not determining whether the United States had reserved rights or not, that the implied reservation doctrine could be applied to all types of federal reservations. The real impact of this case will be discussed in Section II, infra.

In effect the above-cited cases have created the availability, depending upon the circumstances, of a third system of establishing water rights.

A thorough analysis of the facts of each of the relatively few cases that have invoked the implied reservation

doctrine establishes that said doctrine is based upon the concept of necessity, whether it is the need to provide a living for the Indians or to provide much needed electrical power or to carry out the expressed power of Congress in providing for the national defense, *Nevada, ex rel. Shamberger v. U. S.*, 165 F. Supp. 600 (D. Nev. 1951), infra, and not upon the concept of ownership by virtue of ownership of the land.

To say that every time the federal government acquires land for reservation it acquires the right, state law notwithstanding, to appropriate all such water as it needs, is an unwarranted extension of the real meaning of the cases discussing the implied reservation doctrine.

The theory that the United States Government is the "owner" of water by virtue of owning reserved land is a judicial fiction created to reach a result justified by the existence of overriding public interests. The import of this argument is to say that even though Congress expressly gave the states control over water on public land and itself retained title only to the land when the same body changes the status of the land from public to reserved, it by implication automatically takes back the same water right it expressly gave.

The theory of establishing implied rights based upon equity principles is not new to the law. The doctrine of implied reservation should be recognized for what it is and should be—an equitable method of creating a water right in the United States Government if the circumstances, i.e., the purpose of the reservation viewed in light of all the competing interest and ramifications of the reservation, warrant creating such a right.

C. The circumstances surrounding the reservation of Devil's Hole do not justify the application of the implied reservation doctrine.

Considering the judicial development of the implied reservation theory, the primary question seems to be: Is the governmental purpose for reserving the land of sufficient magnitude to justify the creation of water rights by implication in degradation of state law?

Congressional intention to appropriate unappropriated waters by virtue of an action of reservation can only be measured by examining all the circumstances. The State of Nevada contends that while recognizing the existence of the so-called "implied reservation doctrine," the circumstances surrounding the reservation in the instant case do not justify the application of the doctrine.

1. Presidential proclamation reserving Devil's Hole.

Initially, it is necessary to closely examine the act of reservation creating Devil's Hole as a national monument. By virtue of Presidential Proclamation 2961, dated January 23, 1952 (R.I. 256), a 40-acre tract of public domain surrounding a pool of water known as Devil's Hole was set aside as an addition to the Death Valley national monument. A reading of the proclamation reveals that the protection of the scientifically unique underground pool itself, not the fish in the pool, was the primary concern in making the reservation. The proclamation itself recites that "[T]he said pool is a unique subsurface remnant . . . and is unusual among caverns in that it is a solution area in distinctly striated limestone". There is no specific reference to the preservation of the pupfish. The only reference to fish is in the fourth Whereas clause wherein the

presence of the fish are cited as additional evidence of the historic and scientific value of the *pool*.

The intent to protect the scientifically and historically valuable pool, not the fish, is patently clear from a reading of the proclamation.

The authority for creating national monuments such as Devil's Hole by Presidential proclamation is found in the Act for the Protection of American Antiquities (16 U.S.C.A. §§431-433). As is ably pointed out in appellant Cappaert's brief filed herein the Antiquities Act itself and its legislative history support the proposition that Congress' intent was to limit the types of objects and the amount of land subject to withdrawal. The statute seems to demonstrate Congressional intention only to authorize the President to protect antiquities as opposed to fish, animals, etc. The act allows the President to reserve small tracts of land, but it makes no mention of reserving water.

The expressed intent obvious in the Antiquities Act to limit the extent of any reservation made under the provisions of the Act is in direct conflict with the theory of the United States Government that the implied reservation doctrine extends automatically to all reservations merely by the simple act of reservation.

Certainly, the intent and purpose of the American Antiquities Act and implementing Presidential proclamation of 1952 are patently quite different than the Federal Power Act involved in the *Pelton Dam* case or the Indian treaties present in the *Winters* and *Arizona* cases. Each of these acts of reservation either expressly dealt with water, such as the Boulder Canyon Act, which withdrew

any state authority over the mainstream of the Colorado River, and the Federal Power Act, which basically dealt with the use of water for electrical power or involved circumstances surrounding the creation of the reservation, such as the various Indian treaties which could lead to no other conclusion than that water was intended to be reserved.

It is interesting to note that the Federal Power Act involved in the *Pelton Dam* case even describes what would be considered reserved land under the act in providing that reservation means "national forests, tribal lands embraced within Indian reservations, military reservations and other lands and interests in lands . . . ; *but shall not include national monuments, or national parks;* . . ." 49 Stat. 838, 16 U.S.C. 6796(2). (Emphasis added)

It is not reasonable to assume absent an express pronouncement in the underlying act authorizing the reservation or the existence of special circumstances surrounding the reservation that Congress intended to defeat through the means of "implied rights" the long-standing and well-established water law of the various states. The very terms of the American Antiquities Act tend to refute any implication of an intent upon the part of Congress to have the mere act of withdrawing lands for purposes of a national monument operate as an automatic foreclosure of state control over the water on such monuments. A more rational and supportable position is that the American Antiquities Act under which President Truman acted to withdraw the 40 acres surrounding Devil's Hole and which expressly limits its application

was specifically drawn so as to avoid conflict with state law to every extent possible.

2. Competing water interests.

A second circumstance that is present and somewhat unique in the present case is that it involves not a dispute over competing water rights between persons, such as in the *Winters* and *Arizona* cases, but a dispute over competing water rights between humans and fish. Even in the *Arizona v. California* case, supra, which is cited as the authority for the proposition that the reservation doctrine applies to all federally reserved land, Indian or non-Indian, there was no existing dispute pertaining to the water rights on national forests and recreational areas. The special master simply felt that since the federal lands were adjacent to the mainstream of the river that he should in pursuance of his assigned job of allocating the waters from the mainstream and in order to complete the allocation designate some amounts for the federal lands. Interestingly, underlying the dispute in the *Pelton Dam* case was the concern over the fish versus the need for the dam, and the effect of that decision was to say that the need, as expressed by Congress in the Federal Power Act, for producing electricity must take priority over the fish. Now the government is reversing the argument to say that the needs of the fish must take precedence over human needs.

The water under both the reserved and non-reserved land in the instant case is collected in the Ash Meadows Basin which is an underground drainage basin extending over an area of approximately 4,500 square miles. Without reciting the evidence in detail, which has been done

to a great extent in appellant, Cappaert's, brief, certain general conclusions can be stated based upon the evidence submitted at the two hearings on this matter. It seems apparent from the testimony of the hydrologist that the water in Devil's Hole is not confined to the reserved lands and that any substantial pumping on adjacent non-reserved land in the 4,500 square mile basin, even from many miles away will in time affect the water level in Devil's Hole. (Designated Record, p. 79, lines 1-16; p. 88, lines 5-16). As a result, any farming operations which would require substantial pumping of water from the underground basin would affect the water level in Devil's Hole. (Designated Record, p. 100, lines 10-30; p. 101, lines 1-15).

It has been further established without conflict that appellants, Cappaerts, have invested large sums of money in farming and ranching operations on the adjacent non-reserved land. Specific evidence supporting these conclusions is presented in detail in appellant, Cappaert's, statement of facts and the trial hearing transcript of the first hearing on July 3 and 5, 1972, which is part of the appellate record.

Equally apparent from the evidence presented at both trial hearings is that even the expert biologists cannot say with any degree of certainty what, if any, effect lowering of the water level will have on the pupfish in Devil's Hole. Often their opinions are conflicting as to what result might occur.

Applying the implied reservation theory as urged by the appellee would allow the United States Government for the *possible* benefit of the pupfish to effectively pre-

clude the use and development for the benefit of human beings of approximately 4% of the state which had heretofore been arid and useless land. Analyzing the circumstances and weighing the competing interests in the instant case, as was done in the *Winters* case, undoubtedly favors nonapplicability of the implied reservation doctrine. There is certainly no *justice* in allowing 40 acres of land to tie up the much needed use and development of some 4,500 square miles or more of non-reserved surrounding land. There is not one passage or statement in the *Winters* case, the *Arizona v. California* case, the *Federal Power Commission v. Oregon* case, or the *United States v. Eagle* case that appellee can point to to justify such a result based upon the special circumstances here involved.

Until the doctrine was applied in this case no one could point to a case where the implied reservation doctrine resulted in demonstrable injustice. However, we have now reached that result. Carrying the decision of the Circuit court to its natural conclusion it must be stated that as a practical matter that in any conflict between the needs of man and the fish, the fish have priority. Nothing is said about the possible extinction of the farmers if by the clearly expanded extension of the implied reservation theory, man finds it virtually impossible to live because of the priority given to other species.

In addition to the obvious detrimental effect the unrestricted application of the reservation doctrine will have on the adjacent private owners of non-reserved land such application will preclude or retard development and utilization of large areas located in other parts of the

State of Nevada due to the fact that Nevada contains large areas of reserved land much of which is the source of both surface and groundwater. Further, Nevada also contains large areas of public domain which is subject to further reservation which may quite easily result in this same conflict. Landowners will have little faith in developing land without some assurance of a protected right to the use of water. The lack of certainty, particularly with reference to future needs, that the reservation doctrine creates with reference to groundwater on non-reserved land will be discussed in the next section.

3. Groundwater.

Another circumstance herein involved which is of extreme importance, and possibly the most important circumstance, is the fact that the water is underground as opposed to surface water.

The very nature of underground water makes an extennion of the implied reservation doctrine to such water unreasonable. It is difficult to discuss, as the United States Government does, underground water as appurtenant water in the same sense as the term is used in relation to surface water. By its very nature it is impossible to locate underground water as appurtenant to a particular piece of land. As is readily apparent from the testimony of Dr. William Dudley, the government's expert geologist-hydrologist during the first hearing on the request for preliminary injunction, it is difficult, if not impossible, to locate either the source or the means of connection of the underground water in the Ash Meadow Basin area. Unlike surface streams, the effect

of one well on another well in a different location, often several miles distant, is difficult to determine. The movement of groundwater such as that located in the Ash Meadow Basin is governed by hidden geological formations and gravity thus making predictions of location a scientific guess at best. A semi-technical discussion of the proprieties of groundwater can be found in Thomas, *Underground Sources of Our Water,* USDA, the Yearbook of Agriculture, 1955 and Meyers and Landock, *Water Resource Management,* a Coursebook in Law and Public Policy, Chapter IV, pp. 553-566 (1971). Due to the groundwater's slow and unseen movement, the effect of using the water in one area may not be known for several years. Therefore, users of the water pursuant to state law may invest large sums of money based upon the existence of water only to find many years later that such use affects a distant area of land and very likely in Nevada, as in the instant case, a federal reservation.

The use of groundwater as a major supplemental source of water and, in many cases, the primary source, has increased dramatically in the last few years. To now insert the threat of the implied reservation doctrine into the realm of groundwater which is at best a highly unpredictable area would be an unwarranted and unnecessary extension of the doctrine. Most western states, including the State of Nevada, realizing the inherent difficulties of controlling the use of groundwater and on the other hand the necessity of making it available for use have enacted, in order to insert some certainty and equality into the use of groundwater, extensive statutes governing its use. Chapter 534, Nevada Revised Statutes.

It is quite obvious as earlier stated that the water in Devil's Hole is not confined to the reserved land, nor is the water in appellant, Cappaert's, wells confined to non-reserved land. To apply the implied reservation doctrine to exclude the State of Nevada's control under its statutes over the use of such underground water, thereby leaving no scheme of control at all on either the reserved or non-reserved land, would unquestionably defeat the expressed purpose of the Nevada statute, and the common good of the public and create chaos.

Further, since no one really knows the source of the water for Ash Meadow, the State Engineer could not grant applications for underground water in other areas of the state because it might very well affect Devil's Hole. He would not be in a position to issue any permits for the drilling of wells anywhere near reserved land due to the fact that the United States Government might sometime in the future assert a right to the same groundwater. Such a result would emaciate Nevada's statutory system of determining water rights. It is difficult to imagine that the cases applying the implied reservation theory intended this result.

Even more unsettling is the uncertainty the doctrine creates with reference to what groundwater rights the United States Government might, in the future, claim on existing reserved lands, of which Nevada is extensively endowed, such as national forests, which were once long distances from developed areas but are now adjacent to highly developed areas.

There are only two court decisions involved with groundwater under federal reservations, and both are

district court decisions and are distinguishable from the present case. The first case, *State ex rel. Shamberger v. U.S.*, supra, was appealed to the Ninth Circuit Court of Appeals, but the Court refused to consider the question due to lack of jurisdiction within the terms of 43 U.S.C. §666(a); and, therefore, the merits of the decision were never reviewed. 279 F.2d 699 (1960).

The land involved in *State ex rel. Shamberger v. U.S.*, supra, was a United States Government naval ammunition depot reserved prior to 1935 for the purpose of national defense. In 1935 the State of Nevada by specific legislative enactment ceded to the United States exclusive jurisdiction upon and over the land. The Court specifically noted that the development and operation of the wells on the federal property did not at anytime interfere with anyone's vested right. Id., p. 603. In its finding that the United States did not have to obtain permission from the state to operate the wells located on federal land the Court held that under the federal supremacy doctrine the laws of a state could not take precedence over expressed powers of the federal government, i.e., the specifically delegated power to provide for the national defense. Therefore, the purpose of the federal reservation (naval depot) being to further the national defense such purpose could not be frustrated by state law. The Court also placed some emphasis on the *Pelton Dam* case as a basis for its decision, but as earlier discussed the *Pelton Dam* decision was decided on essentially the same basis, i.e., a conflict of state law with the expressed purpose of Congress. It should be again emphasized that the *Pelton Dam* Court was dealing only

with water "on" the reservation, not groundwater. There seems to be no question that the problem of national defense was an overriding consideration in the *Shamberger* case and a special circumstance which is not present in the instant case.

The *Shamberger* case like the *Pelton Dam* case is a supremacy case wherein the power of the United States must take precedence over state's rights.

Even accepting for the moment the principle that under the reserved land theory the United States has exclusive control of the waters under the reserved lands, the contention of the United States Government that the government can, through the application of the implied reservation theory and procedurally through this injunctive action, control the use of water not on reserved land is completely without any basis in principle or case law.

The United States Government in the instant case has urged that the theory of implied reservation is applicable, both to give it exclusive control of the administration and use of the water in Devil's Hole and to allow it to prevent the use of underground water on adjacent *non-reserved land.*

The implied reservation doctrine, even though it may be conceded *arguendo* to apply to federal enclaves and even this monument reservation, at no time has been expanded to accord the federal government overriding interest and control and exclusive jurisdiction as regards non-reservation groundwaters. The *Shamberger* case and other cases may give federal immunity as regards surface water and drilling for groundwaters on federally reserved lands. They do not stand for the proposition

that such reservation can prohibit state grants of non-reserved groundwater. To do this would be to invest by implication the federal government with exclusive or overriding jurisdiction over all groundwater in this country and every presumed final state grant.

The *Shamberger* case does not stand for the proposition urged by the government. To say on one hand that the state cannot control the use of water on reserved land and then turn around and say, however, that the United States Government can control water on non-reserved land in degradation of the state law is a tortured and an unwarranted application of the *Shamberger* case or any of the cases setting forth the implied reservation theory. In the case of *U.S. v. Fallbrook Public Utility District,* 165 F.Supp. 806, 831 (1958), the Court faced with essentially the same conflict expressly rejected this type of extension of the implied reservation doctrine in holding that the United States Government may be entitled to use water in streams on the reserved land, but it was not entitled thereby to control use of water not on reserved land by preventing upper stream owners from appropriating water prior to it reaching the reserved land.

In *Tweedy v. Texas Company,* 286 F.Supp. 383 (D. Mont. 1968), although saying by means of *dictum* that the waters reserved to the Indian reservation were both surface and underground water, the Court did not use the implied reservation theory to decide the case, but rather concluded that such rights should be determined in accordance with federal law which is based upon need and use (the theory of prior appropriation). The Judge held

that the Indians could not establish title to the water through use or otherwise and relying on the case of *U.S. v. Ahtiamin Irrigation Dist.* 231 F.2d 321 (9th Cir. 1956), Cert Den. 352 U.S. 988, 1 L.Ed.2d 367 (1957) reasoned that what is reserved to the Indians is not the ownership of the water, but the right to use of it for the purpose of satisfying a need. Page 386.

D. Conclusion.

The implied reservation doctrine was not invoked in its initial stages on the basis of ownership of land and to attempt to now insert that principle as a basis is inaccurate, confusing and conducive to unreasonable and arbitrary results. The theory in its purest form involves a process of determining what competing interest is more in need of water. If the purpose of the reservation requires water and if effecting such purpose is of more importance to the general welfare than use of the water by a competing interest, the doctrine may be applied. If not, it should not be applied. This determination requires a close examination of all the circumstances. Viewed in this light the reservation doctrine is not inconsistent with the riparian doctrine or the prior appropriation doctrine, but rather is an exception to these doctrines if the special circumstances so dictate. An implied water right, if viewed in these terms, can be created, if justified, within the existing procedures for creating appropriative rights.

It is obvious to everyone familiar with the history of water development, particularly in the arid western states, that there must be water laws, but as stated in the words of Charles E. Coker, Esq., in a speech made

to the Colorado River Users Association on December 6, 1971, "[T]hat need for law will never be supplied by the unfettered discretion of federal attorneys acting as the voice of the federal sovereign".

Only in highly unusual situation should a water right need to be created by implication. Congress can quite easily protect the interest of the United States Government through express reservations which explicitly identify the water reserved in terms of quantity, source, place and purpose of use.

It is the position of appellant, State of Nevada, that none of the circumstances above discussed can be said to support an implied intent to reserve the water in Devil's Hole, and thus the doctrine of implied rights should not be here applied. In fact, the circumstances here involved dictate exactly the opposite result.

II. DOES THE STATE OF NEVADA HAVE JURISDICTION TO DETERMINE BOTH THE EXISTENCE AND SCOPE OF ALL WATER RIGHTS, INCLUDING RESERVED RIGHTS, THAT MIGHT BE ASSERTED TO THE WATER IN DEVIL'S HOLE?

Sound administration of the vital areas of water rights dictates that the determination, adjudication, and administration of all water rights, whether appropriative, riparian, or implied, must be within the confines of the existing state statutory schemes. This concept is not new to the law. Several federal district courts have stated that water rights the United States may have and the extent thereof must be determined by the law of Nevada. *U.S. v.*

Hennen, 300 F.Supp. 256 (D. Nev. 1968); *U.S. v. Humboldt Lovelock Light and Heat,* 97 F.2d 38 (9th Cir. 1938).

The Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.,* 73 F.2d 555 (9th Cir. 1934), 295 U.S. 142 (1935), laid the groundwork for state control when it provided for judicial acceptance of the Congressional policy, exerted through the various federal land acts, that water rights being essentially a local problem could be best handled in accordance with the state's own custom and law. This policy established the principle that the states should determine water rights unless Congress expressly stated otherwise.

In 1952 in an obvious attempt to waive its sovereign immunity and to give the states the power to involve the United States in the adjudication and administration of water rights, Congress passed as part of the Department of Justice Appropriation Act of July 10, 1952, Ch. 651, §208(a)-(c), 66 Stat. 560, 43 U.S.C. §666 (1970), the so-called "McCarran Amendment" (Appendix C, page XXV, Intervenor's Petition for Writ of Certiorari).

Several issues with regard to the provisions of the McCarran Amendment were resolved in a recent case. In *U.S. v. District Court for the County of Eagle, supra,* the court held that any federal questions presented in a state water adjudication proceeding could be decided originally by the state subject to review in a federal court. This Court further went on to hold that the U.S. Government's claim to reserved water rights, implied or otherwise, was subject to adjudication under state law by virtue of the McCarran Amendment by stating:

> "[W]e deal with an all-exclusive statute concerning the adjudication of right to the use of water of a river system which in section 666(a)(1) had no exceptions and which, as we read it, includes appropriative rights, riparian rights, and *reserved* rights." (Emphasis added.)

The federal government in the *Eagle* case also argued that its claimed reserved rights should not be subjected to the state proceedings because such implied rights may conflict with state appropriative rights which are inconsistent with reserved rights, but this court rejected the argument and clearly recognized the jurisdiction of the state to make a determination of the existence of reserved rights by stating:

> "*All such questions,* including the volume and scope of particular reserved rights, are federal questions, which, if *preserved,* are reviewed here after final judgment by a Colorado court." (Emphasis added.)

In *U.S. v. District Court for Division No. 5,* 401 U.S. 527, 28 L.Ed.2d 284, 291, 91 S.Ct. 1000 (1971), a companion case to the *Eagle* case, this court again reiterated its position that the states were perfectly capable of determining and adjudicating all federal water claims regardless of how they might arise.

The opinion of the Ninth Circuit Court is the present case held that the United States Government was not required to establish its water rights in Devil's Hole pursuant to the state proceedings because the government was not a named *defendant* in the administrative hearing on the application to appropriate water and said hearing was not a general adjudication.

This opinion, of course, presents a very narrow and strict interpretation of the McCarran Act. The comments of the Supreme Court in the *Eagle* and *District Court for Division No. 5* cases, *supra,* in response to the federal government's argument concerning the interpretation of the McCarran Act immediately disclose that this court does not intend to give it a narrow and strict application.

To carry the reasoning of the Ninth Circuit Court to its natural conclusion means that under the new, fuzzy, judicially created dual system of establishing water rights, whoever arrives first at the courthouse of its choice will determine the jurisdiction for determining water rights.

Viewed in the light of both the judicial and legislative development of water law, the McCarran Act is simply a natural extension of the concept long recognized by Congress in other land acts—that all water rights including those on land owned by United States Government should be determined by the various state proceedings. The McCarran Act in its broadest terms, along with the other various congressional enactments, comprise congressional authority of the proposition that the United States Government must perfect its water rights in the state forum like all other land owners.

To key the availability of state procedures to determine the federal government's water rights to the word, *defendant,* in the McCarran Act places an intolerable burden on the State of Nevada in light of its administrative adjudication procedure which, as do several other states, substitutes in the first instance in place of a court a state engineer, expert in the area of water (Appendix A, p. v,

Chapter 534, Nevada Revised Statutes, §534.020). The engineer's decisions are subject to judicial review by the district court (Appendix A, p. iv, Chapter 533, Nevada Revised Statutes, §533.450). In order to establish and maintain any certainty in terms of scope of use in its grant to a private user of the right to use groundwater on land adjacent to reserved land, the State of Nevada would be required to file a court action each time in order to qualify the United States Government as a defendant, which would under the reasoning of the Circuit court decision then allow the state to determine the question of implied water rights on reserved land.

Although the *Eagle* case involved surface water, there is no reason to believe that the same principles would not apply to groundwater. Section 666 (a) (1) of the McCarran Amendment provides "for the adjudication of rights to the use of water of a river system or other source . . ." (Appendix A, p. i). The use of the words "or other source" can only be interpreted as an all inclusive phrase thereby including groundwater. In considering a source other than a river system one immediately thinks of groundwater. It is hard to believe that Congress intended to exclude the provisions of the McCarran Amendment groundwater which by 1952 was quite obviously an important source of water in the western states. Certainly, this same court who reasoned that the phrase "or otherwise" included reserved rights would construe "or other source" to include groundwater.

The United States Government further argued in the *Eagle* case that since all of the water users were not involved as parties to the adjudication that the state proceeding was not a general adjudication within the meaning of the McCarran Amendment and, therefore, the United States could not be made a party thereto. The Court rejected this contention and held that it is sufficient if the "whole community of claims" is involved.

Although the instant case involves a determination of priorities between a private person and the United States Government, it is by no means so limited. An underground basin is analogous to a river system when considering rights to the use of surface water. The basin may be large or small, but it is a roughly defined area from which water can be extracted just as a river and its tributaries comprise an area from which surface water can be extracted. As earlier demonstrated, the use of groundwater from an underlying basin very often affects such water in the entire basin; but because of its underground character, it is difficult to predicate how large of an area and how many users will be affected. The large area of nonreserved land that overlies Ash Meadow Basin and is affected by the level of water in Devil's Hole is a prime example. A decision on the claims exerted by both parties in the instant case will affect the entire basin area of some 4,500 square miles and other users just as definitely as an adjudication of several claims on a river system will affect other users on the system.

In *U.S. v. Dist. Court for Division No. 5,* supra, a companion case to the *Eagle* case, the government argued that a state procedure for determining water rights in a very large drainage basin area on an application by application basis was not a general adjudiction within the meaning of the McCarran Amendment, but the Court again rejected

that contention and said that such proceedings affect the totality of claims in the basin.

In the truest sense of the word and certainly within the purview of the *Eagle* and *Division No. 5* cases the present controversy reaches the whole community of claims.

In Colorado where the *Eagle County* case arose water adjudications are procedurally done judicially. As in many other western states, Nevada uses the administrative adjudication procedure which substitutes in the first instance in place of a court a state engineer, expert in the area of water use. Chapter 534, Nevada Revised Statutes, Section 534.020. N.R.S. 534.020 and N.R.S. 534.080 set forth the procedures for acquiring a right to use groundwater and further provide that any orders or decisions of the state engineer are subject to judicial review by the District Court of the county where the water is located pursuant to NR.S. 533.450. The only real difference between the two systems being the forum for the initial hearing.

The federal question of implied reservation water rights can be and has been raised, as discussed in the next section, at the beginning stages of any proceeding under Nevada law. N.R.S. 534.050 and N.R.S. 534.080 both provide that rights to use groundwater must be obtained in compliance with Chapter 533. N.R.S. 533.325 states that a person wishing to appropriate public water for his use must file an application with the state engineer who must publish notice of such fact, and interested persons wishing to protest such application can do so, and such application and protest may be considered at a hearing. N.R.S.

533.365. Further, N.R.S. 533.370(1)(2) and N.R.S. 533.375 expressly provide that the application for unappropriated water may be refused if to grant it would "prove detrimental to the public interest". An implied right can be asserted by the government at the time any application is filed. The state engineer by virtue of the "public interest" provisions can recognize the existence of such a right and refuse any other application on such basis. If on the other hand the United States Government feels aggrieved because the state engineer did not recognize its asserted implied right, it may preserve the federal question by appeal to the District Court. N.R.S. 533.450.

A fair reading of the *Eagle County* case would reasonably lead one to believe that the McCarran Amendment would apply equally to states with administrative adjudication proceedings when the only difference is the initial forum. In light of the existence in several western states of the administrative adjudication procedure at the time of the McCarran Amendment, including McCarran's *own* state of Nevada, it is hard to believe Congress intended to exclude the administrative procedure as a method of determining the community of claims under the provisions of the amendment.

Absent a federal water law, the only alternative to recognizing the state's right to determine and administer water rights is the use of a special master appointed by the federal district court in each and every case. Would a special master be discharged after each case? If a dispute arose as to violation of court decree, would new masters be appointed? Who would pay the cost? Numerous problems are created if this system becomes the

accepted system for adjudicating and administering federal water rights.

III. THE UNITED STATES GOVERNMENT IS PRECLUDED BY THE PRINCIPLES OF RES JUDICATA FROM COLLATERALLY ATTACKING THE ADMINISTRATIVE DECISION ON DEFENDANTS, CAPPAERTS', APPLICATION.

Accepting the proposition established by the *Eagle County* case, supra, that at minimum there is concurrent, if not exclusive, jurisdiction in the State of Nevada over all groundwater beneath reserved lands and non-reserved lands unless Congress has expressly indicated otherwise, the United States Government by making an appearance in the administrative hearing on the applications of defendants to drill wells and use the water now in controversy should be held to have waived the right to have this case heard *de novo* in federal court and is precluded under the principles of res judicata from collaterally attacking the decision of the State Engineer by means of this proceeding.

This case at its inception was first brought before the state forum and the federal government recognized and participated in the decision. The decision carefully weighed the federal-private equities and ruled in a non-arbitrary matter. If in a state proceeding there is a collision between private adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and reviewed by the United States Supreme Court. *U.S. v. Eagle County,* supra, p. 526; *U.S. v. Dist. Court for Div. No. 5,* supra, p. 530. The federal government failed to perfect its state appeal remedies and

preserve the federal question of implied rights and is, in law and equity, estopped from reinitiating the case by going in the side door and asking the federal court to exercise its jurisdiction, concurrent though it may be, as though the case is beginning *ab initio.*

Defendants Cappaerts, et al., in accordance with the provisions of Chapter 533, Nevada Revised Statutes (Appendix A) filed application with the State Engineer's office in April of 1970, for appropriation of water from the certain wells located on their land adjacent to the 40-acre tract wherein Devil's Hole is located. Subsequently, the United States Government protested in writing said applications (R 000257-280, Designated Record Exhibits 12-17, pp. 269-280). The basis of each of the protests, in summary, was that the pumping of the wells would adversely affect the water in Devil's Hole which would result in harm to the fish living in the pool. No objection to the jurisdiction or the power of the State Engineer to grant or deny the applications was made, nor was there asserted on behalf of the United States Government any existence of a federal water right in the water. Subsequently, on December 16, 1970, the State Engineer pursuant to N. R. S. 533.365 held a hearing on the applications (R II 000355-000438). At the hearing the United States Government again reiterated in detail the reason for its objections to granting the applications (R 000360-000370, Designated Record pp. 286-295). The government'sevidence on this issue included a copy of President Truman's Proclamation of 1952 (R 000428-000429, Designated Record p. 304), and the testimony of George B. Maxey on the hydrology of the Ash Meadow

area (R 000404-000407). The nature, value, and extent of the competing interests of the federal government and the adjacent landowners was thoroughly argued by both parties at the time of the hearing. The State Engineer stated he would evaluate the government's reports and other evidence in rendering his decision (R 000371, lines 9-12). Testimony concerning the farming operation of appellants Cappaerts and their investment was presented through the ranch foreman Mr. B. L. Barnett (R 000373-000384). A reading of the administrative hearing transcript will reveal that the issue of the lowering of the water in Devil's Hole and its effect on the fish therein was thoroughly considered. The very same issue is presented to this court in the instant case. The hearing officer considered the existence of a federal water right but concluded one did not exist (R 000434, lines 11-16). The United States Government did not specifically assert an implied water right.

The State Engineer rendered his decision granting the applications and informed all parties that they had thirty (30) days in which to appeal. Neither party filed an appeal as provided for in N.R.S. 533.540.

The Ninth Circuit Court, in its opinion, implies that "since the solicitor did not raise the jurisdictional issues or any of the legal issues which the United States Government had to the right of water" they are not barred by *res judicata*.

In the case of *L.N.R.R. Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916) the United States Supreme Court held that issues that were or *could have been* adjudicated before the Interstate Commerce Commission as a result of

an administrative hearing were barred from being litigated in a subsequent court action. A party who fails to make a direct attack on an administrative order is barred by res judicata from making a collateral attack on the order. *Kessler v. Strecker*, 307 U.S. 22 (1939). Where a statute, such as the Nevada Water Code, provides for judicial review of the administrative order, any proceeding outside the purview of the statute is regarded as a collateral proceeding, *S.E.C. v. Central-Illinois Corp.*, 338 U.S. 96, 93 L.Ed.2d 1836 (1949) and an order issued pursuant to said statute is not subject to collateral attack. *U.S. v. William Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

In a more recent United States Supreme Court case involving an issue as to a collateral attack on an administrative decision, the Court in *U.S. v. Utah Construction Co.*, 384 U.S. 394, 16 L.Ed.2d 642 (1966) held that administrative findings were not subject to collateral attack.

In a very recent Ninth Circuit case, *Paramount Transport System v. Chauffeurs, Etc., Local*, 436 F.2d 1064 (9th Cir. 1971) the Court in holding the principle of collateral estoppel applicable to a hearing by the trial examiner under the Labor Management Relations Act stated that the doctrine of collateral estoppel is applicable to bar a collateral attack on an administrative decision even if the aggrieved party fails to appeal the decision.

It is sufficiently clear that appeal, where it exists, rather than collateral attack, is the remedy of parties disappointed by the decision of an administrative body in matters properly before them. *Reconstruction Finance Corp. v. Lithesty*, 185 F.2d 167 (1950). The exact definition of a theory upon which collateral attacks of adminis-

trative orders are barred is unnecessary. In *Bower v. Eastern Airlines,* 214 F.2d 623 (3rd Cir. 1954) which involved a dispute of a labor arbitration decision the court said:

> "We see no reason to give a party who has submitted a controversy to administrative action a second independent review of the decision. It doesn't matter if we say the party is bound by his own election between administrative remedy and judicial remedy or call it res judicata, he should not be allowed to attack the decision".

It has been clearly established that the United States Government can in a proper case be estopped. *Moser v. U.S.,* 341 U.S. 41 (1951); *Roberts v. Great American Insurance Co.,* 357 F.2d 938 (U.S. Ct. Cl. 1966). See also *Vestal v. Commissioner of Internal Revenue,* 152 F.2d 132 (U.S.C.A., Dist. of Col. 1945), wherein the Court said that in a proper case the doctrine of election or estoppel may be applied to the United States Government and its officials. The State of Nevada submits that the present case is a proper case for the application of these principles.

The principles of res judicata have been applied in at least one water controversy case involving the United States Government. In a case very similar to the present case which involved a water adjudication proceeding in which the United States asserted claims to certain water the Court held that the United States having become a party and the Court having jurisdiction of the subject matter any determination with regards to the water rights of the United States is res judicata to other proceedings. *Green River Adjudication v. U.S.,* 404 P.2d 251 (Utah 1965). The Court therein stated that "if the rule

were otherwise, the government through its agents, could be wholly arbitrary about asserting water rights, if and when, it pleased".

The proposition that the state courts do have jurisdiction over federally reserved water rights is clearly established in the case of *U.S. v. District Court of Eagle County,* supra, as previously discussed herein. Certainly, the sovereign immunity of the United States if it exists in these cases at all was waived and the government subjected to the jurisdiction of the state court by making its appearance in the administrative hearing on the subject applications. *U.S. v. Hennen,* supra.

The United States Government clearly made an appearance and argued its case in the administrative hearing held by the State Engineer of Nevada. The decision was entered against the United States, and it failed to appeal as provided in the Nevada Statutes. Now it takes the position that the state has nothing to say about what water can or cannot be used in the Ash Meadow area. To allow the United States Government to maintain this action would clearly violate the principle or res judicata and collateral estoppel and render meaningless the administrative order of the State Engineer.

The adjudication of water rights in the State of Nevada and other semi-arid western states is not an exercise in metaphysics, but a real and vital issue to the people who live here. Underground water is like the river water described in Justice Holmes' quote, "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York,* 283 U.S. 336, 342 (1931).

CONCLUSION

Initially, appellant, State of Nevada, is contending that the so-called doctrine of implied reservation does not and should not apply to this case. The cases setting forth that doctrine should be limited to their particular facts and not extend automatically to any reservation of land by the federal government.

The doctrine is not based upon ownership, but upon necessity. An implied intent like other implied rights recognized in our system of law is based upon principles of equity; therefore, such a right should not be created unless the equities so dictate. In order to imply an intent in accordance with equity principles the circumstances surrounding the reservation of Devil's Hole must be examined. A thorough examination of such circumstances, i.e., the President's proclamation, the competing interests and the nature of underground water, do not support an implied intent on the part of the United States Government to reserve the water in Devil's Hole at any certain level to the absolute exclusion of other water users.

That the federal government and the State of Nevada have at minimum concurrent jurisdiction to determine the existence and scope of any federal reserved rights is well established by the *Eagle County* case. The State of Nevada having jurisdiction to consider reserved rights, implied or otherwise, and the United States Government having appeared in an administrative hearing to determine such rights should be estopped from collaterally attacking the administrative decision. The government's proper remedy is to exhaust the administrative and judicial remedies provided in the pertinent statutes.

Therefore, we respectfully request that the order granting the preliminary injunction, dated June 5, 1973, should be reversed, and the complaint and motion for permanent injunction filed on behalf of the United States Government be dismissed.

Dated, Carson City, Nevada,
August 15, 1975.

Respectfully submitted,
GEORGE ALLISON,
PETER D. LAXALT,
Special Deputy Attorneys General,
By GEORGE ALLISON,
Attorneys for Intervenor and Appellant, State of Nevada.

(Appendix A Follows)

APPENDIX

Appendix A

STATUTES INVOLVED

1. Federal Statutes

THE McCARRAN AMENDMENT, 43 U.S.C. § 666(a)

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

2. State Statutes

(a) The 1913 Nevada Act for the Adjudication of Water Rights, &c., now ch. 533 of the Nevada Revised Statutes, provides in pertinent part as follows:

> 533.010. *"Person" defined.* As used in this chapter, "person" includes a corporation, an association, the United States, and the State, as well as a natural person.

533.025. *Water belongs to public.* The water of all sources of water supply within the boundaries of the state whether above or beneath the surface of the ground, belongs to the public.

533.030. *Appropriation for beneficial use.*
I. Subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise.

533.035. *Beneficial use: Basis, measure and limit of right to use.* Beneficial use shall be the basis, measure and the limit of the right to use of water.

533.325. *Corporations, persons desiring to appropriate water, change place of diversion, manner or place of use to make application to state engineer for permits.* Any corporation authorized to do business in this state, or any person, as defined in NRS 533.010, or any citizen of the United States, or any person who has legally declared his intention to become a citizen of the United States, over the age of 21 years, desiring to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, make an application to the state engineer for a permit to make the same.

533.365. *Interested person may file verified protest with state engineer against granting of application; notice to applicant of protest; hearings; technical rules of evidence do not apply.*

1. Any person interested may, within 30 days from the date of last publication of notice of application, file with the state engineer a written protest against

the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

2. . . .

3. The state engineer shall duly consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved; but no hearing thereon shall be had except after due notice by registered or certified mail to both the applicant and the protestant. The notice shall give the time and place at which the hearing is to be held and shall be mailed at least 15 days prior to the date set for the hearing.

4. The hearings shall be conducted under such rules and regulations as the state engineer may make, which he is hereby empowered to make, for the proper and orderly exercise of the powers conferred herein; but technical rules of evidence shall not be deemed to apply.

533.370. *Approval, rejection of applications by state engineer; conditions; procedure; appropriation of waters of Colorado River.* [*Effective July 1, 1974.*]

1. Except as provided in subsection 2, the state engineer shall approve all applications made in proper form where all fees, as provided in this chapter, have been paid which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or to be otherwise detrimental to the public welfare.

2. Based upon the public interest and the economic welfare of the State of Nevada, the state engineer

may in his discretion approve or disapprove any application of water to beneficial use or any application which contemplates a change in the place or beneficial use of water to a use involving the industrial purpose of generating energy to be exported out of this state.

533.375 *State engineer may require additional information before approval or rejection of application.* Before either approving or rejecting the application, the state engineer may require such additional information as will enable him to guard the public interest properly, and may, in case of an application proposing to divert more than 10 cubic feet per second of water, require a statement of facts.

533.450. *Orders, decisions of state engineer subject to judicial review: Procedure; appeals; appearance of attorney general.*

1. Any person feeling himself aggrieved by any order or decision of the state engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated; but on stream systems where a decree of court has been entered, the action shall be initiated in the court that entered the decree. Such order or decision of the state engineer shall be and remain in full force and effect unless proceedings to review the same are commenced in the proper court within 30 days following the rendition

of the order or decision in question and notice thereof is given to the state engineer as provided in subsection 3.

(b) The 1939 Nevada Act relating to Underground Waters, now ch. 534 of the Nevada Revised Statutes, provides in pertinent part as follows:

534.010(d). *Definitions.*

(d) "Percolating waters" are underground waters, the course and boundaries of which are incapable of determination.

2. As used in this chapter, the terms "underground water" and "groundwater" are synonymous.

534.020. *Underground waters belong to public; subject to appropriation for beneficial use; declaration of legislative intent.*

1. All underground waters within the boundaries of the state belong to the public, and, subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.

534.050. *Permit to appropriate water required before sinking well in designated ground water basin; no permit required in undesignated areas prior to water development; penalties.*

1. Every person desiring to sink or bore a well in any basin or portion therein in the state designated by the state engineer, as provided for in this chapter, shall first make application to obtain from the state engineer a permit to appropriate such water, in accordance with the provisions of chapter 533 of NRS relating to the appropriation of the public waters,

before performing any work in connection with the boring or sinking of such well.

2. In other basins or portions therein which have not been designated by the state engineer no application or permit to appropriate such water is necessary until after the well is sunk or bored and water developed. Before any legal diversion of water can be made from the well, the appropriator must make application to and obtain from the state engineer, in accordance with the provisions of chapter 533 of NRS, a permit to appropriate such water.

3. Any person using water after a permit has been withdrawn, denied, canceled, revoked, or forfeited is guilty of a misdemeanor. Each day of violation of this subsection shall constitute a separate offense and be separately punishable.

534.080 *Appropriation of underground water for beneficial use from artesian or definable aquifer; Acquisition of rights under chapter 533 of NRS; order to desist; dates of priority.*

1. A legal right to appropriate underground water for beneficial use from an artesian or definable aquifer subsequent to March 22, 1913, or from percolating water, the course and boundaries of which are incapable of determination, subsequent to March 25, 1939, can only be acquired by complying with the provisions of chapter 533 of NRS pertaining to the appropriation of water.

2. The state engineer may, upon written notice sent by registered or certified mail, return receipt requested, advise the owner of a well who is using water therefrom without a permit to appropriate such water to cease using such water until he has complied with the laws pertaining to the appropriation

of water. If the owner fails to initiate proceedings to secure such permit within 30 days from the date of such notice, he shall be guilty of a misdemeanor.

3. The date of priority of all appropriations of water from an underground source, mentioned in this section, is the date when application is made in proper form and filed in the office of the state engineer pursuant to the provisions of chapter 533 of NRS.